

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

FINANCIAL GUARANTY INSURANCE
COMPANY,

Plaintiff,

v.

ALEJANDRO GARCÍA PADILLA et al.,

Defendants.

CIVIL NO. 16-1095 (JAF)

NOTICE OF AUTOMATIC STAY

TO THE HONORABLE COURT:

COME NOW, co-defendants Hon. Alejandro García Padilla, Hon. Juan C. Zaragoza Gómez, Hon. Luis Cruz Batista, Hon. Víctor Suárez Meléndez, Hon. César Miranda Rodríguez, Hon. Melba Acosta Febo,¹ solely in her official capacity as member of the Working Group for the Fiscal and Economic Restoration of Puerto Rico, and Hon. Juan Flores Galarza, in their respective official capacities (collectively “defendants”), specially appearing and without submitting to the jurisdiction or venue of this Court, and hereby state and pray as follows:

1. The complaint in the case of caption was filed on January 19, 2016 (Docket No. 1), following the issuance of Executive Order (“EO”) 2015-46 by the Governor of Puerto Rico, co-defendant Alejandro García Padilla, and its implementation through EO 2015-49 (collectively, the “Executive Orders”). Docket Nos. 1-22 and 1-23. EO 2015-46 essentially invoked Art. VI, Section 8 of the Constitution of Puerto Rico in light of the island’s current fiscal crisis and the fact that the “resources” or “revenues” (as the terms are used in the Constitution) of the Commonwealth of

¹ This Court may take judicial notice of the fact that Ms. Acosta Febo is no longer a member of the Working Group for the Fiscal and Economic Restoration of Puerto Rico, as she is no longer President of the Government Development Bank of Puerto Rico. In light of the foregoing, Ms. Acosta Febo should be removed from the complaint in this case.

Puerto Rico (the “Commonwealth”) were not sufficient to cover all of the appropriations **for the last fiscal year (FY16)**, which ended on June 30, 2016. On the other hand, EO 2015-49 delegated on the Office of Management and Budget of the Commonwealth (“OMB”) the responsibility to set the priority guidelines for the payment of the Commonwealth’s obligations pursuant to Section 4(c) of OMB’s enabling act, PR Act 147-1980 (the “OMB Act”), in light of the activation of Article VI, Section 8 of the Constitution. Docket No. 1-23. Plaintiff’s complaint alleged that the Executive Orders and several Puerto Rico statutes were preempted by Section 903(1) of the Bankruptcy Code, 11 U.S.C. §903(1). Plaintiff also alleged that the Executive Orders were unconstitutional and sought to enjoin defendants from taking any action pursuant to them. See Docket No. 1 at 51-52.

2. On February 10, 2016, defendants filed a motion to dismiss plaintiff’s complaint. Docket No. 37. Plaintiff opposed this motion on February 29, 2016 (Docket No. 47) and defendants replied on March 11, 2016. Docket No. 58. The matter was thus submitted for the Court’s resolution.

3. On October 4, 2016 the Court issued an Opinion and Order in this case, together with an Opinion and Order in a related action, Assured Guaranty Corp. v. García Padilla, Civil No. 16-1037 (“Assured”). See Docket No. 65. In this Opinion and Order the Court granted defendants’ motion to dismiss plaintiff’s preemption claims based on Section 903(1) of the Bankruptcy Code, but denied defendants’ motion to dismiss on Eleventh Amendment grounds and allowed plaintiff’s constitutional challenges to the Executive Orders to proceed.

4. Between the date when the dispositive motions in this case were submitted for resolution and this Court’s Opinion and Order, two significant events transpired. First, FY16 ended on June 30, 2016, and a new fiscal year for the Commonwealth began on July 1, 2016 (FY17).

Second, on June 30, 2016 the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), Pub. Law 114-187, was enacted into law. Defendants respectfully submit that these events have mooted plaintiff’s claims, as pled, and automatically stayed the continuation of these proceedings moving forward.

5. Art. VI, Section 8 of the Constitution of Puerto Rico (“Section 8”) provides as follows:

In case the available revenues including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law.²

6. The text of the Constitution clearly states that Section 8 is activated when revenues or “resources” are insufficient **for a given fiscal year**, in other words, when there is a shortfall in the budget for that year. *Id.* The Executive Orders were approved in light of a deficit in the budget for FY16.

7. On July 1, 2016, the Puerto Rico Legislature approved a budget for FY17.³ This budget governs the Commonwealth’s appropriations and expenditures for the current fiscal year. When FY16 ended and FY17 began with the approval of a new budget, the measures taken to address the shortfall **in the budget for FY16** pursuant to Art. VI, Section 8 of the Constitution of Puerto Rico, including the challenged Executive Orders, expired or became moot.

8. “When a case is moot—that is, when the issues presented are no longer live or when the parties lack a generally cognizable interest in the outcome—a case or controversy ceases to

² “Cuando los recursos disponibles para un año económico no basten para cubrir las asignaciones aprobadas para ese año, se procederá en primer término, al pago de intereses y amortización de la deuda pública, y luego se harán los demás desembolsos de acuerdo con la norma de prioridades que se establezca por ley.”

³ See Joint Resolutions of the Puerto Rico Legislature 59-2016 and 60-2016, which may be found at http://www.oslpr.org/2013-2016/resoluciones_conjuntas/doc/Resolución%20Conjunta-59-01-Jul-2016.doc and http://www.oslpr.org/2013-2016/resoluciones_conjuntas/doc/Resolución%20Conjunta-60-01-Jul-2016.doc

exist, and dismissal of the action is compulsory.” Redfern v. Napolitano, 727 F.3d 77, 83-84 (1st Cir. 2013) (citation omitted). In this case, plaintiff’s main complaint revolved around the “clawback,” pursuant Section 8, of certain funds that plaintiff claimed were “pledged” in favor of the bondholders it insures. See for example, Docket No. 1 at ¶¶ 103 and 110. This “clawback” allegedly took effect through the challenged Executive Orders. Id. Regardless of the merits of plaintiff’s legal contentions, throughout its complaint plaintiff acknowledges that the “clawback” provided for by the Constitution of Puerto Rico and enforced through the challenged Executive Orders was effective through FY16. See, for example, Docket No. 1 at ¶¶ 51, 95, 101, 104, 108, 110, 111. Plaintiff cannot deny that, at the conclusion of FY16, it cannot suffer any harm as a result of the challenged Executive Orders, because the “clawback” complained of was only effective through FY16.

9. Since this complaint was filed, it is public knowledge that the Commonwealth has taken other measures to address the current fiscal crisis. For example, on April 6, 2016 the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act, Act No. 21-2016 (the “Moratorium Act”) was passed. Several Executive Orders have been issued pursuant to the Moratorium Act. A number of bondholders and their insurers, **including some of the plaintiffs in the related Assured case**, Civil No. 16-1037, have challenged the Moratorium Act and the Executive Orders issued pursuant to it. See, for example, Assured Guaranty Corp. et al v. Commonwealth of Puerto Rico et al., Case No. 16-2384. Plaintiffs in that case recognize that such actions have been stayed pursuant to PROMESA. See, for example, Case No. 16-2384 at Docket No. 1. A hearing regarding plaintiffs’ request to lift the PROMESA stay in the separate action filed by Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (collectively “Assured”), two of the plaintiffs in related Case No. 16-1037, has been scheduled for November 3, 2016. Case No. 16-2384 at Docket

No. 44. Similarly, a separate action filed by Ambac Assurance Corporation, the remaining plaintiff in related Case No. 16-1037, has also been stayed. See Ambac Assurance Corporation v. Puerto Rico Highways and Transportation Authority, Case No. 16-1893, Docket No. 69.

10. Congress enacted PROMESA in response to “a fiscal emergency in Puerto Rico.” PROMESA § 405(m)(1). In particular, Congress determined that “[a] comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process.” Id. § 405(m)(4). To that end, Congress found that “an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving this territorial crisis.” Id. § 405(m)(5).

11. As Congress explained, “[t]he stay advances the best interests common to all stakeholders, including but not limited to a functioning independent Oversight Board created pursuant to this Act to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation that may have been commenced prior to the effectiveness or upon expiration of the stay.” Id. § 405(m)(5)(A). Further, “[t]he stay is limited in nature and narrowly tailored to achieve the purposes of this Act, including to ensure all creditors have a fair opportunity to consensually renegotiate terms of repayment based on accurate financial information that is reviewed by an independent authority or, at a minimum, receive a recovery from the Government of Puerto Rico equal to their best possible outcome absent the provisions of this Act.” Id. § 405(m)(5)(B). The stay will “allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits.” Id. § 405(n)(2).

12. Immediately upon enactment, PROMESA thus automatically stayed, among others, “with respect to a “Liability,” “the commencement or continuation ... of a judicial ... proceeding against the Government of Puerto Rico that was or could have been commenced before the enactment of this Act.” *Id.* § 405(b)(1).⁴ PROMESA also automatically stayed the commencement or continuation of a judicial proceeding to recover a “Liability Claim” against the Government of Puerto Rico that arose before the enactment of the Act. *Id.*

13. PROMESA defines a “Liability” as follows:

The term “Liability” means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, **including rights, entitlements, or obligations** whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law **related to such a bond**, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form, of which—

(A) the issuer, obligor, or guarantor is the Government of Puerto Rico; and

(B) the date of issuance or incurrence precedes the date of enactment of this Act.

PROMESA § 405(a)(1) (emphasis added).

14. PROMESA defines a “Liability Claim,” in relevant part, as follows:

The term “Liability Claim” means, as it relates to a Liability....The right to an **equitable remedy for breach of performance if such breach gives rise to a right to payment**, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

PROMESA, § 405(a)(2)(B) (emphasis added).

15. As explained above, plaintiff’s complaint, challenging the constitutionality of Executive Orders issued to address a shortfall in the budget **for last fiscal year**, became moot

⁴ The term “Government of Puerto Rico,” as defined in PROMESA, includes officers such as defendants, sued in their official capacity (§ 405(i)(1)), as well as government instrumentalities (§ 5(11)).

when the fiscal year ended, a new budget was approved and the Executive Orders ceased to have effect.

16. In any event, because plaintiff's standing to bring all its claims hinges on its status as insurer of bondholders, its claims clearly "relate to" its rights with respect to the bonds. But for its claimed interest in these bonds, plaintiff would have no claims.

17. For purposes of the PROMESA automatic stay, it makes no difference whether plaintiff's asserted right to relief arises under the bonds themselves, or some other source of law, such as the Constitutions or statutes of the United States or Puerto Rico. The statute specifies that a "Liability" includes "rights, entitlements, or obligations ... related to ... a bond," regardless of "whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law." PROMESA § 405(a)(1). This Court has already concluded that constitutional claims by bondholders are stayed by PROMESA. See Case No. 16-1610 at Docket No. 99.

18. Plaintiff's claims are moot, in light of the approval of a new budget and the beginning of a new fiscal year for the Commonwealth. In any event, even if these claims are not moot, they are clearly stayed by PROMESA.

19. Plaintiff could have attempted to amend its complaint prior to this Court's resolution of the pending dispositive motions, but decided not to do so. Any attempt to amend its complaint at this juncture, after the passage of PROMESA, would be clearly stayed as well.

WHEREFORE, for the foregoing reasons, this action has been automatically stayed as a matter of law by section 405 of PROMESA.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 14th day of October, 2016.

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